of any discussion of the question, either in the Constitutional Convention or in Congress, would lend support to this view.[16] The actual position of consuls makes it unlikely that a legislature would deliberately extend to them any considerable immunities. They have no great international political importance. They are often nationals of the country to which they are representatives. Scattered in large numbers over the land, they are frequently engaged in a variety of private enterprises. The uncompensated inconvenience which the assertion of consuls' immunities may involve thus becomes a strong argument for a literal interpretation of the words of the statute creating them.[17] On such an interpretation, a consul's loss of his authority involves also a loss of all immunity from suit or prosecution in state courts.

THE MEANING OF "CLEAN HANDS" IN EQUITY — When may a defendant in equity, without a defense upon the merits, appeal to the doctrine of "clean hands"[1] to put his opponent out of court? Courts have long agreed that the plaintiff's alleged misconduct must have reference to the very matters in controversy,[2] but beyond this vague generalization, decisions offer no consistent guide. The demand for predicability in judicial decisions requires that the Chancellor's discretion be controlled by some more clear and definite principle. Situations may be classified as: (1) cases where the plaintiff is engaged in a continuing course of fraudulent or illegal conduct, more or less closely connected with the subject-matter of the suit; and (2) cases where the plaintiff's misconduct is at an end, and he seeks restoration of the *status quo*, or other affirmative relief.

In the first type, if the desired relief would further the wrongdoing, no matter against whom the latter is directed, it obviously ought to be denied. One need not here be concerned over the defendant's unearned victory. Justice is not served by substituting an injury to a third party for an injury to the plaintiff. Whether the judicial aid invoked will assist in effectuating a wrong may often be a question of degree, analo-

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[16] See FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. II, 173, 186, 424, 432–433, 576, 600–601, 661; Vol. III, 220; THE FEDERALIST, No. 80. The only reported reference to the matter in the debates on the original bill was made by Mr. Smith of South Carolina, in the House of Representatives. He expressed an intention to move to strike out the provision giving the district courts exclusive jurisdiction over consuls and vice-consuls. Nothing more is said of this motion. The bill passed containing the provision. See 1 ANNALS OF CONGRESS, 799. See 46 CONGRESSIONAL RECORD, 308, 1538, 3216–3220, 3760–3764, 3853, 3998–4008, 4012.

[17] See Valarino *v.* Thompson, *supra;* Iasigi *v.* Van De Car, *supra.* The inconveniences may arise in civil or criminal proceedings; they may be produced by mistakes of fact or of law; they may or may not be aggravated by a delay in claiming immunity until the outcome of a preliminary trial.

[1] "He who comes into equity must come with clean hands," see 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 399. Sometimes phrased, "He that hath committed iniquity shall not have equity," see FRANCIS, MAXIMS OF EQUITY, 5. For the sources of maxims in our law, see Roscoe Pound, "The Maxims of Equity," 34 HARV. L. REV. 809, 827-836.

[2] Lewis' Appeal, 67 Pa. St. 153 (1870); Kinner *v.* Lake Shore Ry. Co., 69 Ohio St. 339, 69 N. E. 614 (1903). See 1 POMEROY, *op. cit.*, § 399; BISPHAM, PRINCIPLES OF EQUITY, 9 ed., § 42.

gous to the difficult problem at law of when a contract becomes unenforceable by reason of its relation to a crime.[3] The decisions on this point seem very satisfactory. Thus protection is refused for a trade-name which is in itself misleading.[4] The court will not lend its aid to a continuing fraud on the public.[5] On the other hand, protection will not be denied to an honest label because others used by the complainant are objectionable.[6] Nor will participation in a restraint of trade debar a plaintiff from preventing infringement of his trade-mark rights,[7] or from enjoining trespass by strikers.[8]

In the second type of case, where the plaintiff seeks property wrongfully withheld by the defendant, or such other relief as would *prima facie* be proper as between the parties, equity cannot in justice say, "the right on which your claim for relief is based involves past injustice to a third party, therefore we refuse to protect you." A sweeping rule to this effect would indeed be to some extent a deterrent to illegal projects. But only when such a deterrent is most clearly demanded by public welfare — as perhaps in the classic case of grave and heinous crime, where one conspirator demands from another his share of the booty[9] — can equity justifiably leave parties exposed to indiscriminate plunder. Any general rule debarring a plaintiff because of past illegal transactions with reference to the subject matter of the suit encourages the unscrupulous to take advantage of persons whose rights, they believe, will not bear rigid scrutiny.[10] It also means that in any equitable proceeding endless collateral and irrelevant issues must be tried out at the instance of a defendant without merits of his own.[11] It leads in short to the conclusion that the Chancellor, since he cannot, *ex hypothesi*, do full justice, not having the injured outsider before the court, must therefore refuse to do justice as between the parties. That this is actually the result of many cases[12] seems due chiefly to the use of the maxim as if it were a self-explanatory rule of decision. From other cases,[13] however, it is clear that the maxim, despite its misleading wording,[14] is not aimed at any such personal disqualification of the plaintiff. If the maxim were phrased "he who comes into equity must come with clean *demands*," it would more plainly disclose its rationale.

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[3] "It may be that as in the case of attempts, the line of proximity will vary somewhat according to the gravity of the evil apprehended, and in different courts with regard to the same or similar matters." Per Holmes, C. J., in Graves *v.* Johnson, 179 Mass. 53, 58, 60 N. E. 383, 383, (1901).

[4] Worden *v.* California Fig Syrup Co., 187 U. S. 516 (1903).

[5] See 31 HARV. L. REV. 889.

[6] Shaver *v.* Heller & Merz Co., 108 Fed. 821 (8th Circ., 1901).

[7] General Electric Co. *v.* Re-New Lamp Co., 128 Fed. 154 (D. Mass., 1904).

[8] Coeur D'Alene, *etc.* Co. *v.* Miners' Union, 51 Fed. 260 (D. Idaho, 1892).

[9] Everet *v.* Williams, See 9 LAW Quart. REV. 197.

[10] See John H. Wigmore, "A Summary of Quasi-Contracts," 25 AM. L. REV. 695, 712 (k).

[11] See Langley *v.* Devlin, 95 Wash. 171, 188, 163 Pac. 395, 401 (1917).

[12] Herman *v.* Jeuchner, 15 Q. B. D. 561 (1885); Dent *v.* Ferguson, 132 U. S. 50 (1889).

[13] See *infra*, notes 18, 22, 24, 26, 28.

[14] That the literal import of the maxim is no safe guide is apparent from the fact that immorality and degraded character have long been held not to make a plaintiff's hands unclean. Dering *v.* Earl of Winchelsea, 1 Cox Eq. 318 (1787); Wright *v.* Wright, 51 N. J. Eq. 475, 26 Atl. 166 (1893).

Courts have generally agreed that a party to an illegal executory contract may rescind and recover for benefits conferred.[15] To this rule the law of quasi-contracts makes an exception in the case of *mala in se*, thus in effect recognizing the paramount policy in favor of every possible deterrent to very serious crime.[16] It has been assumed that the law as to fraudulent conveyances which in some jurisdictions permits a repentent grantor to recover back the property is only for the benefit of creditors.[17] Yet courts of high authority have held that when the grantor shows any independent ground for equitable relief, as for instance that a deed absolute was in fact a mortgage, he does not lose his rights as against the grantee because the transaction also was a fraud on creditors.[18] Where an express trust for an illegal purpose has failed, a resulting trust arises for the benefit of the settlor's heirs or next of kin.[19] But as to whether, after the accomplishment or failure of the illegal purpose, the settlor himself may insist upon a reconveyance from the trustee, there is disagreement.[20] In a case involving an advance of money to create a fictitious appearance of financial trustworthiness, it has been held in England that he cannot.[21] This decision is not easily reconcilable with certain prior English cases which had refused to find in past misconduct a bar to equitable relief.[22] The same considerations must govern the exercise of jurisdiction in the frequent case where a partner in a firm which was organized for, or engaged in, illegal business asks an accounting. Although the prevailing rule would deny relief as to all property wrongfully acquired,[23] yet courts, including the United States Supreme Court, have seized upon slight — and it is believed inconsequential — distinctions by which to escape the supposed necessity of applying the maxim. Thus where the property has been converted into a new form,[24] or where after its acquisition there has been an account stated,[25] or where it has been transferred to a third party in trust for the plaintiff,[26] the latter's hands are considered sufficiently "cleansed."

The majority of recent cases show a wholesome tendency to grant

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[15] McCall *v.* Whaley, 52 Tex. Civ. App. 646, 115 S. W. 658 (1909); Deaton *v.* Lawton, 40 Wash. 486, 82 Pac. 879 (1905).

[16] See KEENER, QUASI-CONTRACTS, 259.

[17] Carll *v.* Emery, 148 Mass 32., 18 N. E. 574 (1888); Symes *v.* Hughes, L. R. 9 Eq. 475 (1870).

[18] Livingston *v.* Ives, 35 Minn. 55, 27 N. W. 74 (1885); Halloran *v.* Halloran, 137 Ill. 100, 27 N. E. 82 (1890); Harvey *v.* Varney, 98 Mass. 118 (1867); Nichols *v.* Patten, 18 Me. 231 (1841); Clemens *v.* Clemens, 28 Wis. 637 (1871).

[19] See 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1032. See SCOTT, CASES ON TRUSTS, 366, n. 1.

[20] *Cf.* Pawson *v.* Brown, L.R. 13 Ch. Div. 202 (1878); Stevens *v.* Ely, 1 Dev. Eq. (N. C.) 493 (1830); Lemmond *v.* Peoples, 6 Ired. Eq. (N. C.) 137 (1849). See 1 PERRY, TRUSTS, 5 ed. § 21.

[21] *In re* Great Berlin Steamboat Co., 26 Ch. D. 616 (1884).

[22] *Cf.* Faikney *v.* Reynous, 4 Burr. 2069 (1767). See English cases cited in note 26 *infra*.

[23] See LINDLEY, PARTNERSHIP, 7 ed., 118-125. For a review of authorities *contra*, see McDonald *v.* Lund, 13 Wash. 412, 43 Pac. 348 (1896).

[24] Brooks *v.* Martin, 2 Wall. (U. S.) 70 (1863). But see McMullen *v.* Hoffman, 174 U. S. 639, 666 (1899).

[25] McDonald *v.* Lund, *supra*, note 23. See Leonard *v.* Poole, 114 N. Y. 371, 379, 21 N. E. 707, 709 (1889).

[26] A line of English cases establish the general principle that where a contract as

equitable relief, where proper as between the parties, very much as a matter of course,[27] and without inquisition into the merits and demerits of the transactions through which the plaintiff derives his rights.[28] Thus, where title to public land had been granted to the defendant under misinterpretation of a statute, a state court imposed upon him a constructive trust in favor of the plaintiff whose claim, though superior to that of the defendant, was secured from their common grantor by fraud.[29] At about the same time, however, a federal court denied protection to an infant who had repudiated her professional contract as against the co-contractor who was using the defunct contract to hinder the infant plaintiff from securing employment elsewhere.[30] It will scarcely be urged that the policy against infants repudiating their agreements is stronger than against grantees securing property rights by fraud. One is forced to the conclusion that in the case of the infant, the judge laid hold of the maxim, as a means to punish the plaintiff — a function which equity did not assume even in the days when the Chancellor, as an ecclesiastic, might have been pardoned for more strenuous insistence upon his tribunal as a "court of conscience."[31]

RESCISSION OF A CONTRACT FOR A MUTUAL MISTAKE OF FACT. — "To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract, has been apparently well nigh the despair of law writers." [1] If text writers and court are unable to agree even on what a mistake is,[2] such confusion and uncer-

between the parties A and B is illegal and unenforceable, yet if A in pursuance of it transfers property to a third person in trust for B, B may recover the property. Tenant *v.* Elliott, 1 Bos. & P. 3 (1797); Farmer *v.* Russell, 1 Bos. & P. 296 (1798); Worthington *v.* Curtis, L. R. 1 Ch. Div. 419 (1875). See also Sharp *v.* Taylor, 2 Phill. Ch. 801 (1848), criticized, however, in Sykes *v.* Beadon, L. R. 11 Ch. Div. 170, (1879). It is generally held that as agent must account for money received in his principal's illegal business. Baldwin *v.* Potter, 46 Vt. 402 (1874); Planters' Bank *v.* Union Bank, 16 Wall. (U. S.) 483 (1872); Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140 (1863); Wilson *v.* Owen, 30 Mich. 474 (1874). For a discussion and criticism of these cases, see 3 WILLISTON, CONTRACTS, §§ 1785-1786.

[2,7] See F. Pollock, "The Expansion of The Common Law," 4 COL. L. REV. 12, 27.

[8] American Ass'n, Ltd. *v.* Innis, 109 Ky. 595, 60 S. W. 388 (1901); Cochran Timber Co. *v.* Fisher, 190 Mich. 478, 157 N. W. 282 (1916); Warfield *v.* Adams, 215 Mass. 506, 102 N. E. 706 (1913); Ely *v.* King-Richardson Co., 265 Ill. 148, 106 N. E. 619 (1914); Langley *v.* Devlin, *supra*, n. 11; Mo. Fidelity & Casualty Co. *v.* Art Metal Const. Co., 242 Fed. 630 (8th Circ. 1917).

[29] Everett *v.* Wallin, 184 N. W. 958 (Minn. 1921). For the facts of this case see RECENT CASES, *infra*, p. 774.

[30] Carmen *v.* Fox Film Corp., 269 Fed. 928 (2nd Circ., 1920). See 30 YALE L. J. 522.

[31] In Ward *v.* Lant, Prec. Ch. 182, 183 (1701) there is a *dictum* that where a person has executed a voluntary deed "to screen himself from taxes" he may nevertheless have relief concerning it in equity.

"This court is not a Court of Conscience," — per Buckley, J., in *In re* Telescriptor Syndicate, (1903) 2 Ch. 174, 195.

[1] *Per* Dodge, J., in Kowalke *v.* Milwaukee Electric Lt. & Ry. Co., 103 Wis. 472, 473, 79 N. W. 762, 763 (1899). See W. W. Kerr, "The Equitable Doctrine as to Mistake," 3 JURID. SOC. PAP. 173; Roland R. Foulke, "Mistake in the Formation and Performance of Contracts," 11 COL. L. REV. 197.

[2] Thus mistake as "some unintentional act, or omission or error," as defined by Mr. Justice Story in his EQUITY JURISPRUDENCE, 14 ed., § 156, is criticized by Mr. Pomeroy as a description of the effects of mistake, or the consequences arising therefrom,